IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 3736 OF 2006

Shri Sanjay Krishnakant Chavarkar ..Applicant

Vs.

1. Mangesh Bhalchandra Mhatre and anr. ..Respondents

WITH

CRIMINAL APPLICATION NO. 4605 OF 2006

The State of Maharashtra (At the instance of Pen Police Station, Taluka Pen, District Raigad) ..Applicant

Vs.

Mangesh Bhalchandra Mhatre ..Respondent

Mr. S.V. Gavand for applicant in Cri.Appln.No.3736/06.

Mr. S.R. Borulkar, Public Prosecutor with Ms. R.M. Gadhvi, APP, for State in Cri.Appln.No.3736/06 & for applicant in Cri.Appln.No.4605/06.

Mr. A.P. Mundargi with Mr. Amol Patankar for respondent-accused in both the applications.

CORAM: B.H. MARLAPALLE, J.

Date of Reserve : January 18, 2007.

Date of Pronouncement: January 22, 2007.

P.C.:

1. Heard the learned counsel for the respective

parties and the learned Public Prosecutor.

2. These two applications have been filed invoking the inherent powers of this court under Section 482 of the Cr.P.C. so as to quash and set aside the order dated 29/8/2006 passed by the learned 1st Ad-hoc Additional Sessions Judge, Raigad-Alibag thereby allowing Criminal Misc. Application No.628 of 2006 and releasing the respondent-accused on bail. The first application has been filed on 9/10/2006 by the original complainant, who is the brother of the deceased Shubhangi @ Rani, whereas the second application has been filed by the State of Maharashtra on 9/12/2006. The complainant is a medical practitioner at Chinchpada, Taluka Pen and his sister Shubhangi, a qualified Microbiologist, was married to the respondent-accused on 31/5/1994, who was running a Pathological Laboratory in the hospital of the complainant and from the wedlock she begot two children. As per the accused when he got up at about 7 a.m. on 3/5/2006, he saw the deceased lying on the floor outside the bathroom and, therefore, he lifted her to keep her on the bed and in that process she scratched him on his face and right hand. Seeing her

condition he called his brother Hemant on phone and, in turn, Hemant went to the complainant, who was waiting at the site of his bungalow under construction and very close to the house of the accused. The complainant came to his sister's house and saw her unconscious with injuries on her lower lip and some injuries on the right hand and right hand palm of the accused. He noticed that his sister was pulseless and pale and, therefore, with the help of a team of doctors frantic efforts were made to revive her, but in vain, as she was already dead. Her dead body was sent for post mortem and the accused was taken in custody. His first bail application was rejected by the learned Additional Sessions Judge on 23/5/2006. After the investigations were completed and charge-sheet was filed, he filed the second bail application, which came to be registered as Criminal Misc. Application No.628 of 2006, which came to be allowed by the impugned order passed by the learned 1st Ad-hoc Additional Sessions Judge.

3. It is the case of the complainant as well as the State that the deceased was being harassed and ill-treated by the accused and there were frequent

quarrels between them over the last one or two years. The accused had developed illicit relationship with one Shamita Shridharan. As per them Shubhangi died a homicidal death and it was not a natural or accidental death, as claimed by the accused. In this regard they rely upon Shamita's statement to the police which also claims that the accused had called on 3/5/2006 on her mobile and informed about the death of his wife owing to an attack. The complainant and the State, on the basis of the post mortem report, claim that Shubhangi was killed by smothering and it was a cold blooded murder and, therefore, it was not a case for the accused being released on bail, pending the trial of the case for offence punishable under Section 302 of IPC.

4. In the case of Anil Kumar Tulsiyani vs. State of U.P. and anr. **[2006(5) SCALE 233]**, the apex court, in para 9, stated thus:-

> "9. Mr. Hansaria, learned Senior Counsel for the respondent, strenuously contended that the respondent is on bail since 7-9-2005, that he has never misused the liberty granted to

him, that there is no allegation of prosecution witnesses being tampered with and there is no apprehension of the respondent absconding or thwarting justice. According to him, there is no ground made out for cancellation of bail. He also contended that the principles applicable to cancellation of bail should be applied when considering an appeal under Article 136 of the Constitution against an order granting bail. We are unable to countenance with this submission of the learned counsel for the respondent. What we are considering is the correctness of the manner in which the respondent has been admitted to bail by the High Court. We are not considering any application for cancellation of bail."

. In the instant case, though the accused has been admitted to bail by the impugned order dated 29/8/2006 and he has been on bail for the last about 5 months, it is necessary to keep in mind that these applications are not filed under Section 439 (2) of Cr.P.C. and they challenge the legality of the order

admitting the accused to bail during the pendency of the trial.

5. In the case of Puran vs. Rambilas and anr. **[(2001) 6 SCC 338]**, while upholding the order of this court cancelling bail in the case of offences punishable under Sections 498 and 304-B of IPC, the apex court, in para 9 and 10, observed as under:-

> "9. .....One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the Trial Court has to be corrected.

10. Further, it is to be kept in mind that the concept of setting aside the unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation....."

. Subsequently, in the case of Ram Govind Upadhyay vs. Sudarshan Singh and ors. **[AIR 2002 SC 1475]** the apex court stated,

"Grant of bail, though being a discretionary order - but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the Court and facts however do always vary from case to case.

. While placement of the accused in the

society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic consideration for the grant of bail more heinous is a crime, the greater is the chance of rejection of the bail, though however, dependent on the factual matrix of the matter.

. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture though however, the same are only illustrative and nor exhaustive neither there can be any. The considerations being:

(a) while granting bail the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the Court in the matter of grant of bail.

(c) While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

. On the touchstone of this settled position in law, it is necessary to examine whether the impugned

order passed by the learned 1st Ad-hoc Additional Sessions Judge is unjustified, illegal and perverse.

6. The first bail application filed by the accused was rejected by the learned Additional Sessions Judge on 23/5/2006 on the grounds mainly stated in para 7, which reads as under:-

> ". Considering all these factors, I find that as at present there are circumstances strongly prima-facie incriminating the accused. The investigation is at the initial stage. The case, appears to be based only on circumstantial evidence. Merely because the Medical Officer has not given any definite opinion about the cause of death, does not mean that the other circumstances cannot be looked into or the other observations and findings recorded by the Medical Officer at the time of post-mortem examination, have to be ignored by the Court. The presence of injuries on the deceased and presence of injuries on the person of accused found on his examination soon after the occurrence, are the

speaking circumstances, which disentitles the applicant/accused from being released on bail..."

7. It is well settled that an order refusing an application for bail does not necessarily preclude another on a later occasion giving more material, further developments and different circumstances. Similarly, an order refusing an application for bail prior to the filing of charge-sheet does not disentitle the accused from filing a fresh application after the charge-sheet is submitted and the accused is better equipped to invite the attention of the court to the evidence sought to be relied upon and submitted along with the charge-sheet so as to convince the court for admitting him to bail. However, as reiterated in the case of State of U.P. through CBI vs. Amarmani Tripathi **[(2005) 8 SCC 21]** the following circumstances are required to be taken into consideration while granting bail in non-bailable offences:-

(a) whether there is any prima facie or reasonable ground to believe that the accused

had committed the offence;

(b) nature and gravity of the charge;

(c) severity of the punishment in the event of conviction;

(d) danger of the accused absconding or fleeing, if released on bail;

(e) character, behaviour, means, position and standing of the accused;

(f) likelihood of the offence being repeated;

(g) reasonable apprehension of the witnesses being tampered with; and

(h) danger, of course, of justice being thwarted by grant of bail.

8. While noting that by the earlier order dated 23/5/2006 the application for bail filed by the

accused was rejected, the learned 1st Ad-hoc Additional Sessions Judge in the impugned order set out some of the following grounds for admitting the accused to bail:-

(a) The evidence prima facie disclosed that deceased was suffering from epileptic attacks.

(b) The photographs of the petitioner and the injury certificate, prima facie, indicates that there were scratch marks on the person of petitioner.

(c) Dr. R.D. Khandare who issued the injury certificate on 3/5/2006 had mentioned object of injuries as hard and blunt, but did not mention that the contusion on the left hand palmer aspect was bite mark.

(d) It seems that Dr. Khandare has issued cause of death as well as opinion only on 13/7/2006 and that too after tendering his resignation of the post of Medical Officer.

(e) In my view possibility of Shubhangi suffering from epileptic attacks and while she was being taken on her bed, she tried to grapple him and, therefore, the accused sustained abrasions on his person. In the epileptic attacks the person may grapple and in such circumstances injuries from the nail marks can be prima facie possible. The photographs and injury certificate of the petitioner indicate that there are abrasions on right arm of the petitioner and that can be possible when petitioner picked up Shubhangi from the place in front of bathroom.

(f) According to the complainant there was smothering as pillow was pressed on the face of the Shubhangi. It may be noted that no such cause of death was disclosed during post-mortem. The tongue of Shubhangi was inside the mouth. There were as many as five doctors who gave medical treatment to Shubhangi just before her death. If Shubhangi was dead, there was no necessity to give medical treatment or revive respiration of

Shubhangi. In my view there is a prima facie record to show that cause of death is added by Dr. R.D. Khandare and that too after tendering his resignation. In my view, asphyxia due to smothering could have been noticed at the time of post mortem itself. However, this cause of death is given by Dr.R.D. Khandare on 13/7/2006.

(g) The learned counsel for the petitioner rightly submitted that there were injuries on the lips of Shubhangi and blood stains on the pillow and pillow cover are possible. He submitted that in epileptic attach there is locking of jaws and teeth. In such circumstances the injuries on the lips are prima facie possible.

9. The learned Judge also noted that the post-mortem report was carried by two medical officers i.e. Dr. R.D. Khandare and Dr. S.R. Jadhav on 3/5/2006 and in the same, the cause of death was reserved. However, when the final opinion was given

on 13/7/2006 regarding the cause of death as "terminal cardio respiratory failure due to asphyxia due to smothering", it was not signed by Dr. S.R. Jadhav. In short, the learned Judge, prima facie, accepted the contention of the accused that Shubhangi got a epileptic attack and died in the same on 3/5/2006 after the doctors failed to save her from that attack and the medical opinion in the post-mortem report regarding the cause of death has been discarded.

10. This approach of the learned Judge is perverse and palpably erroneous. There is no medical opinion placed on record along with the charge-sheet that Shubhangi died of an epileptic attack or she got an epileptic attack, fell on the ground, sustained injures and died. When the autopsy was done on the dead body of Shubangi final opinion of the cause of death was reserved as viscera was preserved for sending it to chemical analyser. No doubt, the final opinion regarding the cause of death has been given on 13/7/2006, there is no reason as of now to believe that it is the opinion of one doctor and the other doctor i.e. Dr.S.R. Jadhav did not subscribe to the same. The learned Judge accepted the contention of

the accused that Shubhangi was suffering from epileptic attack and she got an epileptic attack before her death. The medical papers placed on record by the accused indicated that on 22/3/2000 multiplanar multiecho MR of the brain was performed when Shubhangi was referred to the P.D. Hinduja National Hospital & Medical Research Centre at Mumbai and no significant abnormality was seen in the brain. On 13/3/2000 she was claimed to have got an attack but it does not show that it was an epileptic attack. The medical case papers also show that it was a single episode and her father was a case of epilepsy. The medical case papers also show that she was advised to take Eptoin tablets on 31/5/2001. Thereafter there is nothing to show that Shubhangi had ever suffered any epileptic attack. The learned Judge recorded his opinion that she died of epileptic attack.

11. In his statement, recorded on 3/6/2006, the accused described the circumstances of Shubhangi's death as under:-

"Today I got up at 7 a.m. and noticed that my wife was not in the bed room and at that time

my younger son Siddhu was crying. I felt my wife had gone to the bathroom and hence I waited for some time but she did not come. Hence I went towards the bathroom and noticed that in the passage Shubhangi was lying on her side on the floor. When I was trying to lift her, she suddenly caught hold of me as if in attack. I managed myself and somehow put Shubhangi on the cot in the bed room. During that period she had tried to catch my right hand, face by her hands and due to the same her hand nails had left scratches on my hands. After I put her on the cot, she became unconscious....."

. The accused was sent for medical examination and medical certificate issued by Dr.Khandare, which was also placed before the court below, has listed the following injuries on the person of the accused:

(a) Scratch abrasion on the Rt maxillary region 2 cm x 1 cm. within 24 hrs.

(b) Abrasion on the neck region on Rt side 1 cm x 1 cm within 24 hrs.

(c) Abrasion on the neck region near the medial end of the Rt. clavicle 1 cm x 1 cm

within 24 hrs.

(d) Abrasion on the Rt. chest wall below the Rt. clavicle 2 cm x 1 cm within 24 hrs.

(e) Abrasion on the Rt. chest on the pectoral region above the Rt. nipple 4 cm x 1 cm within 24 hrs.

(f) Abrasion on the Rt. deltoid region 3 cm x 1 cm within 24 hrs.

(g) Abrasion 4.5 in number on the Rt arm, oblique within 24 hrs.

(h) Abrasion on the Rt. forearm on redial side on rental aspect within 24 hrs.

(i) Contusion on the Lt hand on palmar Aspect, rend colour 2 cm x 2 cm within 24 hrs.

(j) Abrasion on the Lt arm near the deltoid region oblique 4 cm x 1 cm within 24 hrs.

(k) Abrasion 2 - 3 in number on the Lt. arm near axillary region within 24 hrs.

. This certificate as well as photographs of the accused indicate that he had sustained number of bleeding scratches on his person and they were not only on his right hand, right palm and the face, but the scratches are also on his chest, on his left arm, right arm, right hand, face. The medical certificate shows that there are in all 11 injuries and though in the medical certificate it was stated that they could have been caused by hard and pointed/blunt object, on getting C.A. report the doctor confirmed that they

could have been caused by nails. These scratches having been caused by nails is not disputed by the accused himself and there was no reason for the learned Judge to discard the medical opinion that Shubhangi died homicidal death on account of smothering. Whether Dr. S.R. Jadhav agreed with the final opinion is a matter of evidence during the trial or whether he had any other opinion could also be a subject matter of evidence to be adduced during the trial. For the consideration of bail, the material placed on record did not permit the court below to discard the medical opinion that Shubhangi died a homicidal death on account of smothering and to accept the case of the accused that she died on account of epileptic attack. The reasoning given by the court below on this point is totally perverse.

12. Much has been said about the resignation of Dr.Khandare by the learned Judge and that the said doctor was not in service on the day he signed the final medical report dated 13/7/2006. It is immaterial, whether he was in service on that day or not. When he was one of the doctors who had conducted the post-mortem on 3/5/2006 and also issued advance

death certificate on which the cause of death is described as "Opinion reserved. However the viscera preserved for chemical analysis and histopath examination". On receipt of the viscera report from the J.J. Hospital and C.A. report from the Forensic Science Laboratory, Kalina, Mumbai, the cause of death was confirmed as "terminal cardio respiratory failure due to asphyxia due to smothering". There was no reason for the learned Judge to believe, even prima facie, that the other doctor i.e. Dr. S.R. Jadhav did not agree with the said view just because he had allegedly not signed below the said writing and there is no legal bar in issuing the final certificate by one of the two doctors for filing the charge-sheet.

13. After the complainant saw the condition of Shubhangi on reaching her house after he received the message from the brother of the accused and though he had noted that she was pulseless and respiration had stopped, he being a doctor and her brother, it was only natural that he wanted to do his best to revive. The learned Judge failed to appreciate this. Even in the post-mortem report in column 11, it has been stated that the time of death could be 8 to 12 hours

earlier. The post-mortem had started at 2 p.m. and was completed at 3.30 p.m. This would indicate that Shubhangi died some time after the midnight of 2/5/2006 and before 7 a.m. on 3/5/2006. The attending circumstances on her bed, namely, the pillow and pillow cover having been stained in blood and when the blood group is found to be the same as that of Shubhangi, the learned Judge fell in error in recording a prima facie opinion that Shubhangi died on account of epileptic attack. The learned Judge prejudged the prosecution case by discarding the medical opinion and substituting the same by his own opinion regarding the cause of death. It was not permissible for him to substitute his own opinion in place of Dr.Khandare's opinion and also to record a finding while deciding a bail application that Shubhangi died after she was treated by a team of doctors in the morning at 3/5/2006. There is no doubt that the learned Judge took upon himself the role of a medical practitioner while accepting the case of the accused that his wife died on account of epileptic attack and in a way concluded the sessions trial at the stage of deciding the application for bail. This approach is against all canons of well settled legal

principles in criminal jurisprudence. Unwittingly the learned Judge rejected the prosecution that Shubhangi died a homicidal death and held that she died on account of epileptic attack that too without the sessions case going in for a full-fledged trial. Consequently, the course of justice has been thwarted and, therefore, this court is required to step in and more particularly in view of the gravity of the offence alleged against the accused.

14. In the premises, these applications succeed and the same are hereby allowed. The impugned order dated 29/8/2006 passed by the learned 1st Ad-hoc Additional Sessions Judge, Raigad-Alibag in Criminal Misc. Application NO.628 of 2006 is hereby quashed and set aside. The accused shall surrender forthwith.

Trial is hereby directed to be expedited.

(B.H. Marlapalle,J.)